

Appeal from a decision of the Administrator, Western Technical Center, Office of Surface Mining Reclamation and Enforcement, reaffirming decision not to process unsuitability petition in part.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Areas Unsuitable for Surface Coal Mining: Generally -- Surface Mining Control and Reclamation Act of 1977: Permits: Application

Where OSM has not acted in an arbitrary and capricious fashion, a decision under 30 CFR 764.15(a)(7) not to consider an unsuitability petition filed pursuant to sec. 522(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1272(c) (1982), to the extent it involves land which is subject to a Federal Coal Mining and Reclamation permit application which was filed, and the first newspaper notice thereof published, prior to the filing of the petition, will be affirmed.

APPEARANCES: Donald B. Peterson, pro se; Brian E. McGee, Esq., Denver, Colorado, for intervenor, Pacific Coast Coal Company; Susan K. Hoven, Esq., and Linda C. Breland, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Donald B. Peterson has appealed from a decision of the Administrator, Western Technical Center, Office of Surface Mining Reclamation and Enforcement (OSM), dated August 22, 1984, reaffirming a May 25, 1984, decision not to process a petition to declare lands unsuitable for surface coal mining operations "as it relates to that portion of the petition area that coincides with Pacific Coast Coal Company's [Pacific Coast] proposed John Henry No. 1 mine permit area." ^{1/} The petition had been filed pursuant to section 522(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1272(c) (1982).

^{1/} Citizens Concerned About Strip Mining (CCASM) and Esko G. Cate were named appellants in the appeal, which was originally captioned Citizens Concerned About Strip Mining, et al. In accordance with the terms of a settlement agreement

On April 6, 1984, an unsuitability petition was filed by CCASM and others (petitioners) to have approximately 800 acres of land in southeastern King County, Washington, near the city of Black Diamond, including the land encompassed in the proposed John Henry No. 1 mine permit area, declared unsuitable for surface coal mining operations because such operations would affect natural hazard and fragile lands and be incompatible with residential use of the nearby area. The petition urged OSM to process the petition with respect to the proposed permit area under 30 CFR 764.15(a)(7), despite the fact that the "first notice about the completeness of the permit application has been published." However, the petition also noted that "[m]uch of the technological and other information needed to review a lands unsuitability petition for this area will be developed during the permit review process, and the two things may, to a certain extent, be considered together."

By letter dated April 20, 1984, OSM notified petitioners that the unsuitability petition had been received but that OSM could not begin to process it until May 16, 1984, at which time the "procedures and criteria" for designating lands unsuitable under OSM's Federal program for the State of Washington would "be applicable," citing section 504(a) of SMCRA, 30 U.S.C. § 1254(a) (1982), and 30 CFR 736.15(b)(1). 2/

By decision dated May 25, 1984, the Administrator, Western Technical Center, OSM, notified the attorney of record that OSM had decided not to process the unsuitability petition to the extent it encompasses the proposed mine permit area because the petition was filed after the permit application had been determined to be administratively complete and the first newspaper notice of this determination had been published, i.e., on January 11, 1984,

fn. 1 (continued)

entered into between CCASM, Cate, and Pacific Coast, the appeal was dismissed as to CCASM and Cate by Order dated Nov. 21, 1986. As Peterson did not participate in the Settlement Agreement, the appeal was recaptioned to recognize Peterson as the party bringing this appeal.

Counsel of record withdrew from representation of Peterson in this matter on July 21, 1986. Appellant has not retained new counsel or submitted additional briefs. Apparently he deems those reasons previously submitted for appeal to be sufficient to represent his position. The original petitioners recognized by OSM, in addition to the original appellants, were: Sheila E. and Raymond F. Drury; Matthew Lee Reichert; Bennett C. and Edith L. Peterson; Joan P. and R. Brian Easton; Shawn G. Coles; James F. and Barbara L. Clemens. By order dated Nov. 27, 1984, the Board granted Pacific Coast's motion to intervene in this proceeding as a "full party." Pacific Coast and OSM have submitted briefs in opposition to appellant's statement of reasons for appeal.

2/ Departmental regulation 30 CFR 736.15(b)(1) provides that the Director, OSM, "shall implement the procedures and criteria of a Federal program for a state for designating lands unsuitable for all or certain types of surface coal mining one year after a Federal program is made effective for a State." The Federal program for the State of Washington became effective on May 16, 1983. 48 FR 7883 (Feb. 24, 1983).

citing 30 CFR 947.764(a), and 30 CFR 764.15(a)(7). 3/ The Administrator stated that: "OSM will consider concerns raised in the petition and relating to this portion of the petition area as part of its review of the John Henry No. 1 mine permit application. OSM has decided to process the petition as it relates to the remainder of the petition area."

On June 27, 1984, the petitioners requested OSM to reconsider the May 1984 decision not to process their unsuitability petition with respect to the proposed mine permit. Therein, they contended that the newspaper notice had afforded inadequate public notice that an administratively complete permit application had been filed 4/ and maintained that since OSM could not entertain an unsuitability petition after May 16, 1983, and prior to May 16, 1984, under 30 CFR 736.15(b)(1), petitioners had no opportunity to file a petition prior to the filing of an administratively complete permit application and first newspaper notice thereof during that time period. In essence, petitioners argued that it would be "inequitable" to invoke 30 CFR 764.15(a)(7) in such circumstances.

By decision dated August 22, 1984, the Administrator, Western Technical Center, OSM, informed the attorney of record that OSM had decided to reaffirm the May 1984 decision "to exclude the proposed [mine] permit area from the area being considered for an unsuitability designation." The Administrator stated that OSM clearly had the authority to invoke 30 CFR 764.15(a)(7) because the filing of an administratively complete permit application and first newspaper notice thereof "had taken place before OSM had received and considered CCASM's petition." The Administrator concluded that the fact that CCASM could participate in the permit review process justified OSM's decision not to process the unsuitability petition in part. 5/ See 48 FR 41333 (Sept. 14, 1983). The Administrator also stated that processing the unsuitability petition for the proposed mine permit area and the permit

3/ Departmental regulation 30 CFR 764.15(a)(7) provides that: "The regulatory authority may determine not to process any petition received insofar as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice has been published."

Departmental regulation 30 CFR 947.764(a) makes the provisions of 30 CFR Part 764 applicable to surface coal mining operations under the Federal program for the State of Washington.

4/ Petitioners submitted an affidavit dated Jan. 24, 1984, signed by William A. Ziegner, publisher of the "Voice of the Valley" newspaper, with a copy of the legal notice published by Pacific Coast on Jan. 11, 1984. That notice stated: "Pursuant to code of Federal regulations Part CFR 947.773, Notice is hereby given that Pacific Coast * * * has submitted a federal coal mining and reclamation permit application for the John Henry No. 1 mine [to OSM]."

5/ The Administrator stated:

"Specifically, in the review process for permitting the John Henry No. 1 mine area, CCASM has the opportunity to participate in the public comment on the preparation of the EIS (which several members of CCASM have done); file written objection to the application pursuant to 30 CFR 947.786(a) and 786.13; and request an informal conference pursuant to 30 CFR 947.786(a) and 786.14(a) (which CCASM has done)."

application separately would delay processing of the permit application and be a "costly duplication of time and effort." The Administrator concluded that discretion to designate lands as unsuitable "may just as properly and appropriately be exercised through permit denial or imposition of permit conditions." The Administrator also stated that the January 1984 newspaper notice, to which petitioners object, was "not defective."

In the statement reasons for appeal, appellant reiterates the objection to the January 1984 newspaper notice as constituting "inadequate public notice" which OSM is not entitled to reply upon and the contention that, because he had no opportunity to file an unsuitability petition prior to the filing of an administratively complete permit application and first newspaper notice thereof, 30 CFR 764.15(a)(7) should not be invoked. 6/ Appellant requests that OSM be required to process the "entire lands" unsuitability petition.

In its brief, Pacific Coast argues that appellant may not appeal from the August 1984 decision of the Administrator because of a failure to timely appeal the May 1984 decision of the Administrator, in accordance with 43 CFR 4.1282(b). It does not seem that OSM considered the May 1984 decision a final decision for purposes of appeal since it invited questions and did not advise the appellant that it was appealable. The August 1984 decision on the other hand, expounded on the reason for OSM's refusal to process the unsuitability petition in part and notified the appellant of his right to appeal the decision. Departmental regulation 43 CFR 4.1282(b) requires the filing of a notice of appeal of an OSM decision within 20 days of receipt thereof or within 30 days of the date of the decision if the person appealing has not been served. It appears from the record that appellant's former counsel was served on August 27, 1984. Appellant's notice of appeal was filed on September 17, 1984. Thus, we perceive no defects to the timely filing of a notice of appeal from the August 22, 1984, decision.

Pacific Coast argues in the alternative that the appeal from the August 1984 decision should be dismissed because appellant failed to serve it with a notice of appeal and statement of reasons with respect to that decision in accordance with 43 CFR 4.1283(a). Appellant, however, was not required to serve Pacific Coast under 43 CFR 4.1283(a) because Pacific Coast was not then considered a "party" to this proceeding. Appellant was however required to serve Pacific Coast by this Board's November 2, 1984, order herein. Pacific Coast states that appellant failed to serve that company within the timeframe set forth in the Board's November 2 order. Even if that is true, we fail to see any prejudice to Pacific Coast and will not dismiss the appeal for that reason.

6/ One of appellant's initial arguments was that it constituted a "denial of due process" for OSM to refuse to accept unsuitability petitions until 1 year after the date of implementation of a Federal program. However, in a response to answers of OSM and Pacific Coast, appellant recognizes that such a course of action is mandated by section 504(a) of SMCRA, 30 U.S.C. § 1254(a) (1982).

[1] Section 522(b) of SMCRA, 30 U.S.C. § 1272(b) (1982), provides that, in implementing a Federal program in a state, the Secretary "shall implement a process for designation of areas unsuitable for surface coal mining for non-Federal lands within such State and such process shall incorporate the standards and procedures of this section." Thus, in the case of the State of Washington, the applicable Federal program (30 CFR Part 947) incorporates the State processes for designating lands unsuitable for surface coal mining operations set forth at 30 CFR Part 764. 30 CFR 947.764. One of the regulations incorporated in the Federal program for the State of Washington is, of course, 30 CFR 764.15(a)(7), invoked by OSM herein. That regulation provides that OSM "may" determine not to process an unsuitability petition "as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice has been published." 30 CFR 764.15(a)(7).

In the present case, appellant argues that 30 CFR 764.15(a)(7) cannot be invoked because inadequate public notice was afforded. In particular, appellant refers to the fact that the January 1984 newspaper notice failed to properly cite the appropriate regulation, citing instead "Part CFR 947.773," and "failed to inform the members of the public that an administratively complete permit application had been received by OSM."

The applicable regulation governing the publication of notice of the filing of a permit application, 30 CFR 773.13(a)(1), cited by the Administrator in the August 1984 decision, sets forth the "minimum" information that public notice of the "submission of an administratively complete application" must contain. The January 1984 newspaper notice fully comports with that regulation. 7/

Appellant argues, however, that 30 CFR Part 773, particularly the public notice provisions of 30 CFR 773.13(a)(1), is not applicable to the Federal program in the State of Washington because it is not incorporated by reference in 30 CFR Part 947. In its response, OSM contends that 30 CFR Part 773, including 30 CFR 773.13(a)(1), is incorporated by reference in that Federal program, even though there is no specific regulatory provision that cross-references that particular part. OSM explains that when the Federal program was promulgated on February 24, 1983, with an effective date of April 25, 1983, the then applicable regulation regarding public notice of the filing of a permit application, 30 CFR 786.11(a) (1982), was incorporated by reference in the Federal program by virtue of 30 CFR 947.786(a) 8/ (48 FR 7885

7/ The notice incorrectly referred to "Part CFR 947.773" as providing for the issuance of public notice. However, all persons dealing with the Government are deemed to have knowledge of duly promulgated regulations, including, in this case, 30 CFR 773.13(a)(1). Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). It was also implicit in the regulation that an administratively complete permit application had already been filed at the time of publication.

8/ 30 CFR 947.786(a) still provides that "Part 786 of this chapter, Review, Public Participation, and Approval or Disapproval of Permit Applications and Permit Terms and Conditions, shall apply to the review of applications made by any person for surface coal mining and reclamation operations." (Italics in original.)

(Feb. 24, 1983). However, effective October 28, 1983, OSM removed 30 CFR Part 786 and included most of those regulatory provisions in 30 CFR Part 773. 48 FR 44344 (Sept. 28, 1983). Thus, the current provisions regarding public notice of the filing of a permit application appear at 30 CFR 773.13(a)(1). No corresponding change, however, was made to 30 CFR Part 947 to reflect the fact that the public notice and other provisions of 30 CFR Part 786 no longer exist under that heading. Nevertheless, we conclude that reading 30 CFR 947.786(a) in conjunction with the Federal Register publication substituting 30 CFR 773.13(a)(1) in place of 30 CFR 786.11(a) establishes as a matter of public record that the public notice provisions are still incorporated by reference in the Federal program for the State of Washington. Publication in the Federal Register constitutes legal notice of the matters contained therein. 44 U.S.C. § 1507 (1982); Federal Corp Insurance Corp. v. Merrill, *supra*.

Finally, appellant argues that 30 CFR 764.15(a)(7) should not be invoked because he did not have an opportunity to file the unsuitability petition prior to the filing of an administratively complete permit application and first newspaper notice thereof. We recognize that, under section 504(a) of SMCRA, appellant had no opportunity to file an unsuitability petition during the 1-year period of time following implementation of the Federal program for the State of Washington because the statutory and regulatory provisions regarding unsuitability determinations were not then applicable. However, the fact of the matter is that the unsuitability petition was filed after the filing of an administratively complete permit application for the proposed John Henry No. 1 mine permit and first newspaper notice thereof, and, in those circumstances, 30 CFR 764.15(a)(7) is clearly applicable.

Under 30 CFR 764.15(a)(7), OSM has the discretionary authority to determine not to process an unsuitability petition, to the extent it includes lands "for which an administratively complete permit application has been filed and the first newspaper notice has been published." That discretionary authority must not be exercised in an arbitrary and capricious fashion, and we conclude that it was not in the present case. It is important to note that exercise of that discretionary authority removes a statutory impediment to approval of a permit application. 30 U.S.C. § 1260(b) (1982); 30 CFR 773.15(c).

As envisioned in the preamble to the final rulemaking which promulgated 30 CFR 764.15(a)(7), that regulation strikes a "fair balance between the petitioner's interest and an operator's commitment to mine." 48 FR 41333 (Sept. 14, 1983). The regulation generally promotes the early filing of unsuitability petitions by providing for consideration of petitions filed prior to the filing of an administratively complete permit application and first newspaper notice thereof. After that time, the regulation recognizes that a permit applicant may have committed substantial resources in preparing and submitting a permit application and that the permit review process should not be disrupted by the filing of unsuitability petitions, except in certain circumstances. The preamble, furthermore, states that the permit review process will afford the "means for citizen input" and that permits "may be conditioned or denied as needed to meet the requirements of [SMCRA]." *Id.* The preamble also quotes from the House Committee report, which is part of

the legislative history of SMCRA, to the effect that the designation process for areas unsuitable for surface coal mining operations is "structured to be applied on an area basis, rather than a site by site determination which presents issues more appropriately addressed in the permit application process." H.R. Rep. No. 218, 95th Cong., 1st Sess. 95, reprinted in 1977 U.S. Code Cong. & Ad. News 593, 631. Finally, the regulation recognizes that there should be the discretion to consider unsuitability petitions filed after the filing of an administratively complete permit application and first newspaper notice thereof where "the regulatory authority believes the area warrants." 48 FR 41333 (Sept. 14, 1983). It is evident that the August 1984 decision of the Administrator fully comports with the purposes of 30 CFR 764.15(a)(7) as envisioned in the preamble to the final rulemaking, by deferring consideration of concerns raised in the unsuitability petition herein to the permit review process. That process affords an ample mechanism for consideration of appellant's concerns. See 30 U.S.C. §§ 1263, 1264 (1982); 30 CFR 773.13, 773.15, and 775.11; see also Natural Resources Defense Council, Inc. v. Office of Surface Mining Reclamation and Enforcement, 89 IBLA 1 (1985).

Appellant has simply presented no reasons why the unsuitability petition must be considered with respect to the proposed John Henry No. 1 mine permit area and, moreover, why the concerns raised in that petition may not appropriately be considered in the context of the permit review process. ^{9/} Appellant has not demonstrated that the area "warrants" review of the unsuitability petition or that the permit review process will not provide an adequate forum to address the concerns raised in that petition. Accordingly, appellant has not established that OSM acted arbitrarily and capriciously in exercising its discretionary authority under 30 CFR 764.15(a)(7) to refuse to process the petition as to the proposed John Henry No. 1 mine permit area. Should the permit review process result in a determination that the land is essentially unsuitable for surface coal mining operations under the criteria enunciated in 30 U.S.C § 1272(a)(3) (1982) and 30 CFR Part 762, a permit application may be denied. In any case, appellant has not been denied a means to present his

^{9/} In a reply brief, appellant argues that review of unsuitability petitions, unlike the permit review process, focuses on the "larger picture" rather than the specific permit area. We can envision circumstances where addressing the concerns raised by an unsuitability petitioner in the context of a permit review process, where only a portion of the land sought to be declared unsuitable is subject to that process, would fail to consider the "larger picture" of the anticipated adverse effects of surface coal mining. Indeed, such a situation might be comparable to impermissible segmentation of a Federal project for purposes of an environmental impact review under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1982). See, e.g., Piedmont Heights Civic Club, Inc. v. Moreland, 367 F.2d 430 (5th Cir. 1981). However, appellant has not demonstrated that the permit review process with respect to the proposed John Henry No. 1 mine in conjunction with review of the unsuitability petition with respect to the remainder of the land covered by the petition, would necessarily fail to consider the purported "larger picture." Appellant also suggests that review of the unsuitability petition alone considers "whether mining would cause injury to the lands involved." This is at odds with one of the primary

objections to issuance of a permit with respect to the proposed John Henry No. 1 mine and to have those concerns addressed by OSM. 10/

On December 24, 1984, appellant filed a request for a hearing to consider the issues raised in this case. However, those issues concern matters of law, not fact, and thus are not properly the subject of a hearing before an Administrative Law Judge. 43 CFR 4.1286; Mackay Bar Corp., 69 IBLA 148 (1982). We hereby deny appellant's request for a hearing.

Accordingly, we conclude that the Administrator, OSM, properly reaffirmed the May 1984 decision not to process the unsuitability petition included herein with respect to the proposed John Henry No. 1 mine permit area pursuant to 30 CFR 764.15(a)(7), and to defer consideration of the concerns raised in the petition to the permit review process.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Gail M. Frazier
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge.

fn. 9 (continued)

aims of SMCRA and OSM's obligations thereunder, including the review of permit applications pursuant to 30 U.S.C. § 1260(a) (1982), which is protection of the land and associated natural resources. See 30 U.S.C. § 1202 (1982).

10/ On Oct. 9, 1984, CCASM submitted a substantive statement of reasons setting forth the "technical reasons" why the proposed John Henry No. 1 mine permit area should be designated unsuitable for surface coal mining operations. We will not address those reasons herein. They are more appropriately addressed by OSM in the context of the permit review process. CCASM has also suggested that mining operations are prohibited under section 522(e) of SMCRA, 30 U.S.C. § 1272(e) (1982), and that operations are otherwise barred under section 522(a)(2) of SMCRA, 30 U.S.C. § 1272(a)(2) (1982), which matters should certainly be addressed by OSM before any permit issues.